COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 18-SC-000534-DE

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH & FAMILY
SERVICES — APPELLANT

v.

On Appeal from Harrison Circuit Family Court,
2017-J-00016 & 2017-J-00016-001,
Court of Appeals, 2018-CA-000164

H.C. — APPELLEE

BRIEF OF COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH & FAMILY SERVICES

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was served on March 11, 2019 by U.S. mail to Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Clerk, Harrison Circuit Court, 115 Joe B. Hall Court #1, Cynthiana, Kentucky, 41031; Joshua McWilliams, McWilliams Law Office, 177 South Main Street, Versailles, Kentucky 40383; Judge Heather Fryman, 115 Court Street, Suite 1, Cynthiana, Kentucky 41031 and Todd Kellett, P.O. Box 877, Cynthiana, Kentucky 41031. The certified record is sealed, so it was reviewed but not withdrawn.

Johann F. Herklotz

INTRODUCTION

This case asks whether, in the absence of a Kentucky statute and as a matter of constitutional law, the Commonwealth must pay for an expert witness for an indigent parent in a dependency, neglect, or abuse proceeding to testify that her drug use does not affect her ability to parent. The Court of Appeals' divided decision imposing this unfunded liability on the Commonwealth based upon obviously distinguishable case law must be reversed, either on the merits or because the Appellee filed an untimely notice of appeal.

STATEMENT CONCERNING ORAL ARGUMENT

Because the Court of Appeals thrust an unfunded liability onto the Commonwealth and did so, in the words of the dissent, by "judicial fiat," the Court should hold oral argument to fully explore the constitutional and separation-of-powers issues at stake. It also would benefit the Court's consideration to discuss at oral argument how it can avoid this weighty constitutional issue because of the Appellee's untimely notice of appeal.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On February 6, 2017, the Cabinet for Health and Family Services filed a petition in Harrison Family Court under KRS 620.070. [Vol. 1, R. 1-5]. This statute allows the Cabinet to file a petition alleging dependency, neglect, or abuse ("DNA") with respect to a child. *See id.* The petition here sought a finding of neglect against H.C as to her child, L.E.

The Cabinet alleged that L.E. had been neglected by H.C. and that L.E. was an "abused or neglected child" under KRS 600.020(1)(a)(3). Under this provision, a child is "abuse or neglected" if the child's "health or welfare is threatened when his or her parent or guardian . . . engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse . . . ." *Id.* The Cabinet's allegations were based upon H.C.'s chronic drug use. [Vol. 1, R. 5].

During the course of the DNA proceeding, drug tests were introduced into the record showing that H.C. had tested positive for buprenorphine on over 40 occasions. H.C.'s numerous positive drug tests were filed into the record on March 9, 2017 [Vol. 1, R. 18-30], March 16, 2017 [Vol. 1, R. 32-33], April 11, 2017 [Vol. 1, R. 34-39], April 21, 2017 [Vol. 1, R. 41-42], August 30, 2017 [Vol. 1, R. 66-100], and November 9, 2017 [Vol. 1, 126-128]. Likely in light of this fact, on November 9, 2017, H.C. filed what she styled a "Motion for Funds for Expert Assistance." [Vol. 1. R. 104-106]. H.C. believed, and desired to show

through expert testimony, that her continued drug use did not rise to the level of impairing her ability to parent L.E. Thus, H.C. sought funds, paid for by the state, to hire an expert witness to testify that, "suboxone does not impair an individual's ability to parent at the levels found in [H.C.]." [Vol. 1, R. 105]. H.C.'s motion did not cite any statute allocating state funds for such a request. In fact, her motion admitted that no such statute exists. Instead, H.C. invoked constitutional due process. [Vol. 1, R. 104-105].

The Harrison Family Court denied H.C.'s expert-fees motion because, as H.C. admitted, no statute grants fees in such a circumstance. [Tab 2] [Vol. 1, R. 143]. On November 9, 2017, the Harrison Family Court entered an Adjudication Order that determined, upon H.C.'s conditional admission, that L.E. was an "abused or neglected child" under KRS 600.020(1). [Tab 3] [Vol. 1, R. 122-125]. In making this conditional admission, H.C. reserved the right to appeal the expert-fees issue. [Vol. 1, R. 123]. On December 21, 2017, the Harrison Family Court entered a Disposition Order placing L.E. in the custody of her maternal grandparents. [Tab 4] [Vol. 1, R. 149-151].

H.C.'s counsel knew about entry of the December 21, 2017 Disposition Order no later than January 3, 2018. As H.C. alleged in her response to the Cabinet's motion for discretionary review, "[c]ounsel originally filed his Notice of Appeal on January 3, 2018. Rather than the Harrison Circuit Clerk stamping the document tendered on that date, the Harrison Circuit Clerk mailed the document back to Counsel because a Motion to Proceed In Forma

Pauperis was not included." [Response to Motion for Discretionary Review, at 4].

Instead of promptly correcting this error, H.C. allowed the mandatory deadline to file her notice of appeal to expire. On January 25, 2018, H.C. filed a "Motion for Belated Appeal" that tried to invoke CR 73.02(1)(d)'s excusable-neglect rule. [Vol. 1, R. 155-157]. In this motion, H.C.'s counsel stated that he had misread the entry date of the Disposition Order as December 27, 2017 as opposed to the actual entry date of December 21, 2017. [Vol. 1, R. 155]. Nowhere in the motion, however, did H.C.'s counsel claim that he failed to learn of the Disposition Order in a timely manner. Nor could he. The Harrison Family Court nevertheless granted H.C. a belated appeal under CR 73.02(1)(d) because of "excusable neglect." [Tab 5] [Vol. 1, R. 167-168].

On appeal, H.C. advanced the novel argument that, as a matter of due process, she was entitled to public funds to obtain an expert witness who would opine that her degree of drug use did not detrimentally affect her ability to parent L.E. Without consulting the Cabinet, the Harrison County Attorney's Office filed a brief on behalf of itself that purported to adopt H.C.'s argument that due process requires that public funds be made available for her to hire an expert witness in this circumstance. Without citing anything, the Harrison County Attorney stated: "[T]he nature of [DNA] cases is so similar in nature to that of criminal charges that fundamental fairness requires funds under KRS Chapter 31 be available to parents in such actions in order to hire expert

witnesses." However, the Harrison County Attorney had no authority to bind the Cabinet to such a novel position. In fact, the Cabinet did not learn of this appeal, and thus of the position taken by the Harrison County Attorney, until the Cabinet received a copy of the Court of Appeals' opinion.

On August 17, 2018, the Court of Appeals vacated and remanded the Harrison Family Court's judgment. [Tab 1]. Writing for a badly fractured court, Judge James Lambert first determined that H.C.'s counsel had demonstrated "excusable neglect" sufficient to extend the time to file a notice of appeal. The Court of Appeals reasoned:

> While the mother used the wrong mechanism and moved for a belated appeal—which must be filed, in this instance, in the Court of Appeals rather than the family court—and based the motion on a mistake in reading the date of the final order rather than failing to learn of its entry, we shall accept the court's ruling in this case and retain jurisdiction to decide the issue raised in the appeal.

[Tab 1 at 5 n.2]. The Court of Appeals thus all but admitted that H.C.'s counsel did not meet the standard of "excusable neglect" under CR 73.02(1)(d), which focuses solely on whether counsel failed to learn of the entry of an order.

On the merits, Judge Lambert, writing for just himself, held that "due process rights may be at stake in such situations and therefore h[e]ld that upon a finding by the trial court that such expert funding is reasonably necessary to establish a defense to a DNA petition, funding for such expert fees shall be paid pursuant to KRS 311.110(1)(b)."[1] [Tab 1 at 10]. In other words, Judge Lambert

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[1] KRS 311.110 is a repealed statute that dealt with medical licenses. Presumably, Judge Lambert meant to cite KRS 31.110(1)(b), which deals with

concluded that, upon a show of reasonable necessity, H.C. would be entitled to *public* funds to hire an expert witness to testify that her drug use did not affect her ability to parent, even though no Kentucky statute authorizes the state to pay for expert fees in this circumstance. [*Id.*].

No other judge agreed with Judge Lambert's rationale. Judge Thompson concurred in the result only without explanation, while Judge Jones filed a vigorous dissent that cast this appeal in terms of the separation of powers. [Id. at 11-14]. Judge Jones wrote that "[w]hile I do not disagree that it would be wise to allow for expert funding in some DNA cases, I do not believe the constitution demands it." [*Id.* at 11]. She continued: "I believe the matter of expert funding for an indigent parent in a DNA case is a matter that should be addressed by the General Assembly not this court." [*Id.* at 12]. After listing the many questions left unanswered by Judge Lambert's opinion, Judge Jones emphasized that this issue "should not be dealt with by judicial fiat." [*Id.*].

Upon becoming aware of the Court of Appeals' opinion, the Cabinet filed a motion for discretionary review on September 17, 2018, seeking to relieve itself of the unfunded mandate that the Court of Appeals had put upon the Commonwealth. On February 7, 2019, the Court granted the Cabinet's motion and established an expedited briefing schedule.

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providing "necessary services and facilities of representation, including investigation and other preparation" for indigent defendants in criminal matters.

ARGUMENT

I. The Court must dismiss this matter because of H.C.'s untimely notice of appeal.[2]

H.C.'s notice of appeal was untimely because the Harrison Family Court erred in granting her additional time to appeal under CR 73.02(1)(d). This matter therefore should be dismissed under CR 73.02(2), which in turn allows the Court to avoid the constitutional issue discussed below.

"A notice of appeal, when filed, transfers jurisdiction from the circuit court to the appellate court." *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990) (citation omitted). The "failure to file a timely notice of appeal [is] a jurisdictional defect that cannot be remedied." *Id.* A party's substantial compliance with the civil rules is irrelevant when it comes to the timeliness of a notice of appeal. *See Ky. Farm Bureau Mut. Ins. Co. v. Conley*, 456 S.W.3d 814, 818 (Ky. 2015), *as corrected* (Apr. 21, 2015).

The civil rules soften this mandatory rule in only one narrow circumstance. Under CR 73.02(1)(d), a trial court may extend the time to file a

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[2] Although the Cabinet did not previously raise this issue, this failure should not be held against it, as explained in Part II.A., *infra*. In any event, the timeliness of a notice of appeal relates to the Court's jurisdiction. *See Flick v. Estate of Wittich*, 396 S.W.3d 816, 819 (Ky. 2013) ("A notice of appeal is the procedural instrument 'by which an appellant invokes the appellate court's jurisdiction.'"). And issues of jurisdiction may be raised at any time. *Commonwealth Health Corp. v. Croslin*, 920 S.W.2d 46, 47 (Ky. 1996). Also, because the Cabinet did not learn about this appeal until after the Court of Appeals issued its decision, and because of the obviousness of the Court of Appeals' error, the Court should excuse any preservation defect under the palpable-error standard. *See Fraley v. Rice Fraley*, 313 S.W.3d 635, 641 (Ky. App. 2010).

notice of appeal "[u]pon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment or order which affects the running of the time for taking an appeal." As the rule conveys, the notion of "excusable neglect" is not elastic. As written, CR 73.02(1)(d) lists only one instance that suffices for excusable neglect to extend the time for taking an appeal. *See Fraley v. Rusty Coal Co.*, 399 S.W.2d 479, 480 (Ky. 1966) ("It is our opinion that the order purporting to extend the time for taking appeal was invalid because on the face of the record *the sole ground* on which such an order may be granted did not exist." (emphasis added)). More importantly, this Court has squarely held that "**a misunderstanding over the filing date is not the type of excusable neglect that would enlarge the time for filing the jurisdictional document after that time expired.**" *AK Steel Corp. v. Carico*, 122 S.W.3d 585, 586 (Ky. 2003) (emphasis added); *see also Wright Starnes v. Cont'l Realty Advisors, Ltd.*, 2016 WL 2638152, at *2 (Ky. App. May 6, 2016) (unpublished) (holding that CR 73.02(1)(d) does not apply when "counsel knew of the entry of the circuit court's order").

This mandatory rule is dispositive here. The Harrison Family Court entered its Disposition Order on December 21, 2017 [Tab 4], and H.C.'s notice of appeal was filed—belatedly—on January 25, 2018 [Vol. 1, R. 158-159]. The notice of appeal should have been filed by January 22, 2018—30 days after the Disposition Order was entered. *See* CR 73.02(1)(a); CR 6.01. In her belated-appeal motion, H.C.'s counsel did not aver that he failed to learn of the entry

of the Disposition Order so as to invoke CR 73.02(1)(d). Indeed, H.C.'s counsel has conceded that he in fact knew about the entry of the Disposition Order by at least January 3, 2018—almost three weeks *before* H.C.'s notice of appeal was due. [*See* Response to Motion for Discretionary Review, at 4]. Rather than invoking the sole basis for relief provided by CR 73.02(1)(d), H.C.'s counsel instead claimed that he simply misread the entry date on the Disposition Order. [Vol. 1, R. 155]. The trial court accepted this argument [Tab 5], but such a finding is clearly foreclosed by this Court's decisions in *AK Steel Corp.* and *Fraley*. To repeat, this Court has held that "a misunderstanding over the filing date is not the type of excusable neglect that would enlarge the time for filing the jurisdictional document after that time expired." *AK Steel Corp.*, 122 S.W.3d at 586. And *Fraley* holds that a court cannot make "excusable neglect" into whatever it wants. *See Fraley*, 399 S.W.2d at 480.

The Court of Appeals did not grapple with these binding decisions, but instead took a surprisingly casual approach to whether its jurisdiction had been invoked. It reasoned:

> The family court extended the time for the mother to file an appeal pursuant to Kentucky Rules of Civil Procedure (CR) 73.02(d),[3] which provides that "[u]pon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment or an order which affects the running of the time for taking an appeal, the trial court may extend the time for appeal, not exceeding 10 days from the expiration of the original time." While the mother used the wrong mechanism and moved for belated appeal—which must be filed, in this

[3] Presumably, the Court of Appeals meant to reference CR 73.02(1)(d), not CR 73.02(d) which does not exist.

> instance, in the Court of Appeals rather than the family court[4]—and based the motion on a mistake in reading the date of the final order rather than failing to learn of its entry, we shall accept the court's ruling in this case and retain jurisdiction to decide the issue raised in the appeal.

[Tab 1 at 5 n.2]. This passage pushes the bounds of reason. The Court of Appeals more or less acknowledged that the Harrison Family Court could not have granted the belated-appeal motion under CR 73.02(1)(d)'s plain language. This is because misreading an order's entry date does not constitute excusable neglect. *See AK Steel Corp.*, 122 S.W.3d at 586; *Fraley*, 399 S.W.2d at 480. Nevertheless, the Court of Appeals glossed over this basic problem and pronounced—without citing any authority—that it simply would "retain jurisdiction" over the matter.

Before this Court, H.C. likely will try to overcome this jurisdictional defect by arguing that her counsel "properly filed his Notice of Appeal, well in advance of the January 22, 2018 deadline." [Response to Motion for Discretionary Review, at 4]. H.C. appears to be referring to the allegation in her belated-appeal motion that her counsel tried to file a notice of appeal on January 3, 2018 (before the 30-day deadline), which the trial court rejected as

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[4] Although not entirely clear, it seems that the Court of Appeals held that a motion under CR 73.02(1)(d) should be filed in the Court of Appeals, not in the trial court. That, however, conflicts with binding precedent. *See James v. James*, 313 S.W.3d 17, 21 (Ky. 2010) ("CR 73.02(1)(d) authorizes the trial court[,] under the stated circumstances, to relieve a party from his or her failure to appeal within the time allowed."). Indeed, CR 73.02(1)(d) itself states that it is the "trial court" that is empowered to extend the deadline for filing a notice of appeal.

deficient and returned to her unfiled. As discussed above, this assertion proves the Cabinet's point: H.C. knew of the entry of the Disposition Order by January 3, 2018 at the latest, thus negating her reliance on CR 73.02(1)(d). Putting that aside, the certified record does not appear to contain a copy of H.C.'s alleged January 3, 2018 notice of appeal.[5] The Court therefore has no basis on which to judge H.C.'s allegation that she tried, but failed, to file a timely notice of appeal. *See Martingale, LLC v. City of Louisville*, 151 S.W.3d 829, 832 (Ky. App. 2004) ("As an appellate court, we generally do not consider matters outside the record.").

Even if this problem can be overcome, H.C. has offered no basis to dispute the trial court's refusal to accept her alleged January 3, 2018 notice of appeal for filing. In H.C.'s belated-appeal motion, she claimed that this notice of appeal was rejected for two reasons: "the designation of record was deficient and . . . there was no motion to proceed in forma pauperis included." [Vol. 1, R. 155]. Although at this point the Cabinet does not know enough to judge the designation-of-record issue, it is well established that, under CR 73.02(1)(b)'s plain language, a motion to proceed *in forma pauperis* must accompany a

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[5] H.C.'s inclusion of her alleged January 3, 2018 notice of appeal as an attachment to her response to the Cabinet's motion for discretionary review comes too little, too late. The civil rules provide a specific process for certifying the record on appeal, which provides guarantees of trustworthiness to the appellate courts as to what did and did not happen before a trial court. *See* CR 75.01; CR 98(3). If a litigant can simply attach an alleged pleading to an appellate filing, the civil rules governing certifying the record on appeal will be for naught.

notice of appeal in order for the latter to be timely filed. *See Haun v. Thompson*, 2018 WL 6264586, at *3 (Ky. App. Nov. 30, 2018) (unpublished) ("CR 73.02(1)(b) requires the circuit clerk's timely receipt of the *in forma pauperis* motion and its supporting affidavit along with the notice of appeal."); *Gambill v. Commonwealth*, 2008 WL 7438766, at *1 (Ky. App. Oct. 3, 2008) (unpublished) ("Although appellant tendered his notice of appeal within the appropriate time period, he did not timely tender a filing fee or a motion to proceed *in form pauperis* as required by CR 73.02(1)(b)."). The Harrison Family Court therefore was demonstrably correct when it refused to accept H.C.'s alleged January 3, 2018 notice of appeal because of her failure to include a motion to proceed *in forma pauperis*. *See* CR 73.02(1)(b).

II. The Court of Appeals' decision should be reversed on the merits.

A. The Harrison County Attorney lacked the authority to bind the Cabinet and never consulted the Cabinet about the legal position taken.

Because the Harrison County Attorney lacked the authority to bind the Cabinet to a legal position before the Court of Appeals, and because the Cabinet was not consulted about the legal position taken there, the Cabinet must be allowed to fully defend its interests here.

This appeal has not proceeded in the ordinary course, with the Cabinet having the opportunity to argue its position before the Court of Appeals followed by it pressing the same position before this Court. Instead, without consulting the Cabinet, the Harrison County Attorney filed a merits brief on

the expert-funding issue in the Court of Appeals. Although this matter concerns an important constitutional issue, the Harrison County Attorney's brief was only one page long. The totality of the argument was:

> The Appellee, Harrison County Attorney, agrees with the argument of the Appellant in that the nature of Dependency, Neglect, and Abuse Cases is so similar in nature to that of criminal charges that fundamental fairness requires funds under KRS Chapter 31 be available to parents in such actions in order to hire expert witnesses. The Appellee, Harrison County Attorney, agrees with and adopts the Appellant's argument in full.

Notably, the Harrison County Attorney did not purport to file a brief on behalf of the Cabinet, instead asserting that the Appellee was the Harrison County Attorney, *not* the Cabinet. However, the Harrison County Attorney was not, and is not, a party to this matter, as confirmed by H.C.'s notice of appeal. Assuming it is timely, H.C.'s notice of appeal states: "The name of the Appellant is [H.C.] and the name of the Appellee is the Commonwealth of Kentucky by way of Cabinet for Health and Family Services." [Vol. 1, R. 158]. Because the notice of appeal "places the named parties in the jurisdiction of the appellate court," *Stallings*, 795 S.W.2d at 957, the Harrison County Attorney was simply incorrect when it described itself as the Appellee before the Court of Appeals. Thus, when the Court of Appeals held that the Cabinet "agreed" with H.C.'s due-process argument, the Court of Appeals could not have been more wrong.

So how did this mishap occur, with the Cabinet only discovering the Court of Appeals' decision after it was rendered? By way of background, KRS

69.210(2) provides that the county attorney "shall attend to the prosecution of all proceedings . . . over which the District Court has jurisdiction pursuant to KRS Chapter 610," which includes DNA matters, *see* KRS 610.010(2)(d). A county attorney therefore generally prosecutes DNA proceedings, but the county attorney does not necessarily represent the Cabinet in a traditional attorney-client relationship. It is perhaps more appropriate to say that a county attorney prosecutes DNA matters in which the Cabinet has an irrevocable statutory interest. At bottom, when, as here, the county attorney and the Cabinet disagree about a DNA case, the Cabinet is entitled to assert its position, regardless of what the county attorney believes is proper.

The Court of Appeals' decision in *D.L. v. Commonwealth*, 2012 WL 5969994 (Ky. App. Nov. 30, 2012) (unpublished), aptly demonstrates this dynamic. There, a county attorney took a position in a DNA matter without consulting the Cabinet, which the family court adopted in an order. *Id.* at *1. Upon learning of the order, the Cabinet filed a motion to alter, amend, or vacate that order, after the county attorney refused to re-docket the case. The family court nevertheless sided with the Cabinet. *Id.* On appeal, the appellant argued that "the trial court erroneously allowed the Cabinet to represent the Commonwealth, when in fact the Commonwealth was already represented by the county attorney." *Id.* at *2. The Court of Appeals rejected that position, holding that "[o]ur case law unequivocally states that the Cabinet is a party in dependency proceedings, and that its role extends far beyond the initial filing

of the DNA petition." *Id.* In so holding, the Court of Appeals relied on its earlier holding that "when the Cabinet files a dependency action, 'the Cabinet is in fact the plaintiff.'" *Id.* (quoting *Cabinet for Health & Family Servs. v. Byer*, 173 S.W.3d 247, 249 (Ky. App. 2005)). For these reasons, the Court of Appeals held that, in a DNA proceeding, the Cabinet is "more than a 'nominal party'" and therefore upheld the family court's order granting relief to the Cabinet. *Id.*

D.L. confirms that the Harrison County Attorney lacked the authority to unilaterally bind the Cabinet to H.C.'s position. Under *D.L.*, the Cabinet has interests that are separate and apart from those of the Harrison County Attorney that—until this stage of the appeal—have not been accounted for. In short, although the Harrison County Attorney was empowered to prosecute this DNA action, it could not express the Cabinet's position without first receiving the Cabinet's consent. The fact that the Harrison County Attorney filed its Court of Appeals' brief on behalf of itself, as opposed to for the Cabinet, is an acknowledgement that Harrison County Attorney knew that it could not bind the Cabinet. For this simple reason, the Cabinet should be free to dispute the position taken by the Harrison County Attorney before the Court of Appeals.

Even if the Court were to find that the Harrison County Attorney actually represented the Cabinet in an attorney-client capacity, the Cabinet still is not bound by the Harrison County Attorney's representations. The rule in Kentucky is as follows:

> A court must assume, of course, that when a lawyer purports to act for a client he has the client's authority, but when it is brought to the court's attention by the client, or by another counsel retained by the client, that the attorney is asking the court to do something the client does not want done, then simple common sense dictates that the court should not thereafter let it happen.

Sullivan v. Levin, 555 S.W.2d. 261, 263 (Ky. 1977), *overruled on other grounds by Smith v. McGill*, 556 S.W.3d 552, 555 (Ky. 2018). This simple rule allows the Cabinet to escape from the Harrison County Attorney's representations before the Court of Appeals. The Cabinet was not consulted by the Harrison County Attorney before its one-page brief was filed in the Court of Appeals. More fundamentally, the position taken in that brief, which acceded to the imposition of an unfunded liability on the Commonwealth in the absence of a Kentucky statute, was obviously a position that the Cabinet opposed. Thus, the Court should not permit the Court of Appeals' opinion to stand solely on an alleged concession by the Harrison County Attorney. This matter deserves adversarial briefing, not a cursory "I agree" brief on an issue of constitutional significance.

Even if the Court is unwilling to consider the Cabinet's position in this matter, it nevertheless should review this appeal under a palpable-error standard. *See Fraley v. Rice-Fraley*, 313 S.W.3d 635, 641 (Ky. App. 2010). Under this standard, the Court should find the Court of Appeals' decision is so unprincipled and so prejudicial to the Cabinet and the Commonwealth more generally that reversal of the Court of Appeals' judgment is warranted.

B. Due process does not require the Commonwealth to pay for expert-witness fees in DNA matters.

The Court of Appeals' core holding cobbles together three decisions from unrelated contexts to hold, as a matter of first impression, that due process requires the Commonwealth to expend state funds to pay for H.C. to retain an expert witness to testify that her undisputed drug use did not affect her parenting. The Court also directed how the Commonwealth was to pay for these expert fees. These holdings distort well-established notions of due process beyond recognition and, accordingly, cannot stand.

Before delving into the Court of Appeals' analysis, it is helpful to provide context about how DNA proceedings work in Kentucky. Under Kentucky law, DNA proceedings are distinct from proceedings to terminate parental rights. DNA proceedings are governed by a preponderance-of-the-evidence standard, KRS 620.100(3), and Kentucky law guarantees appointed counsel for an indigent custodial parent in a DNA proceeding, KRS 620.100(1)(b). A judge presiding over a DNA proceeding has substantial discretion in crafting appropriate relief. Possible dispositions include, but are not limited to, an informal adjustment of the case, entry of a protective order, or removal of the child from the home. KRS 620.140(a)-(c).

The flexibility of DNA proceedings is in sharp contrast to parental-termination proceedings, which are governed by a much higher standard of proof—clear and convincing evidence—and require numerous specific findings under that elevated standard. KRS 625.090. Although Kentucky law

guarantees indigent parents appointed counsel in termination proceedings, the applicable statute makes no mention of state-funded experts. KRS 625.080(3). In light of the statutory differences between a termination proceeding and a DNA matter, Judge Jones summarized in her dissent:

> A DNA proceeding, while quasi-criminal in nature, does not implicate the liberty interests of the party, like a criminal action. Moreover, a DNA action, standing alone, cannot permanently deprive a parent of his or her right to parent. That can only be accomplished through termination of parental rights, which requires separate findings. *See M.H. v. A.H.*, 2015-CA-426, 2016 WL 3962285, at *4 (Ky. App. July 22, 2016) (discussing differences between DNA actions and parental terminations vis-à-vis representation by counsel). A family court has a variety of options available to remedy abuse and neglect, if it finds such has occurred.

[Tab 1 at 11-12]. Because of these fundamental differences, it follows that due process requires different procedures in each context. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.").

The Court of Appeals relied on three cases in concluding otherwise, all of which are readily distinguishable. It primarily relied on *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18 (1981), a case that considered whether due process requires appointed counsel, not expert testimony, for an indigent parent in a termination case, as opposed to a DNA proceeding. *Lassiter* therefore is twice removed from this case. Putting that aside, *Lassiter* expressly recognized that its holding was tied to the unique

nature of termination proceedings. It held: "[T]he State has sought not simply to infringe upon th[e] interest [of parenting] but to end it. If the State prevails it will have worked a unique kind of deprivation." *Id.* at 27. This passage makes abundantly clear that the *Lassiter* Court would have viewed a DNA proceeding, which by definition cannot work a "unique kind of deprivation," very differently from the perspective of due process. More importantly, in considering the right to appointed counsel in the context of termination proceedings, *Lassiter* ruled that appointed counsel is *not* required in all instances. To the contrary, *Lassiter* held that "the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings [should] be answered in the first instance by the trial court, subject, of course, to appellate review." *Id.* at 31-32. Not only that, but *Lassiter* went on to hold that due process *did not require* appointed counsel in the circumstances present there. *Id.* at 32-33.

Merely summarizing *Lassiter*'s holding shows why it is inapplicable here. To summarize, the Court of Appeals took *Lassiter*, a case that solely concerns whether counsel must be appointed for an indigent parent in a termination proceeding, and extended that holding to the different question of whether the Commonwealth must pay for expert fees in a DNA proceeding. In so holding, the Court of Appeals failed to mention *Lassiter*'s careful qualification of its holding as applying where "a unique kind of deprivation" is sought against a parent. *Id.* at 27. Even more troubling, the Court of Appeals

used *Lassiter*, a case that held that appointed counsel is not required in all circumstances, to support the creation of a judicial mandate that expert fees are in fact required whenever expert testimony is "reasonably necessary." [Tab 1 at 10]. If it is constitutionally permissible in some circumstances for a parent who could lose his or her parental rights not to receive counsel, as *Lassiter* holds, it is inconceivable that the same due-process protections would require the state to pay for expert fees in any DNA case in which expert testimony is deemed "reasonably necessary."

The Court of Appeals also based its holding on *Ake v. Oklahoma*[6], 470 U.S. 68 (1985), but that case is even further removed from this case than is *Lassiter*. In *Ake*, a defendant was charged with "murdering a couple and wounding their two children." *Id.* at 70. *Ake*, then, did not even concern parental rights, but the interest of an accused in avoiding the death penalty. The defendant, who was indigent, sought to use insanity as his defense, but he did not receive a state-funded psychiatrist. *Id.* at 73. The jury found the defendant guilty and sentenced him to death. *Id.* In determining whether due

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[6] The Sixth Circuit very recently said, in regard to this case, "In *Ake v. Oklahoma*, the Supreme Court held that 'when a defendant demonstrates to [a] trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist.' 470 U.S. 68, 83 (1985). The Supreme Court, however, has never extended the rule in *Ake* beyond the specific circumstances of that case, see, e.g., *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985), and *Ake* is unavailing for Bullard given that his sanity was not at issue during his trial and that he also requested a non-psychiatric expert, see *Ake*, 470 U.S. at 83." *Bullard v. Jackson*, 18-735, 2018 WL 4735626, at *4 (6th Cir. Sept. 19, 2018) (unpublished).

process requires a state-funded psychiatrist in this circumstance, the Court was careful to note that "[t]he interest of the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis." *Id.* at 78. In light of this substantial interest, which implicates an accused's interest in avoiding the death penalty, the Court held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83.

Ake has no possible relevance here. It appears that the Court of Appeals relied on *Ake* because it extended due-process guarantees beyond merely providing appointed counsel (as in *Lassiter*) to providing state-funded expert testimony in a narrow circumstance. But to say that expert funding is constitutionally required for a psychiatrist in a death-penalty prosecution, as in *Ake*, is a far cry from holding, as the Court of Appeals did, that it must be provided in any DNA case where it is "reasonably necessary." In extending *Ake* to require expert funding in a DNA matter, the Court of Appeals plainly forgot the Supreme Court's instruction that due process is, at bottom, situation specific. *See Lassiter*, 452 U.S. at 24 (holding that due process "is not a technical conception with a fixed content unrelated to time, place and

circumstances"). Although DNA matters are of utmost importance to parents and children, they are in no way comparable to a death-penalty prosecution.

Finally, the Court of Appeals relied upon this Court's decision in *Hicks v. Commonwealth*, 670 S.W.2d 837 (Ky. 1984), a decision that is even more distinguishable than *Lassiter* or *Ake*. *Hicks*, like *Ake*, involved a prosecution for murder. However, unlike *Ake*, *Hicks* did not even concern due process, but instead involved a question of statutory interpretation. *Id.* at 838. *Hicks* involved KRS 31.110, which states that "a needy person is entitled . . . to be provided with the necessary services and facilities of representation including investigation and other preparation." 670 S.W.2d at 838 (quoting KRS 31.110). *Hicks* held, as a matter of statutory interpretation, that KRS 31.110 means that "indigent defendants are entitled to reasonably necessary expert assistance." *Id.* (quoting *Young v. Commonwealth*, 585 S.W.2d 378, 379 (Ky. 1979) (per curiam)). Of course, the question of what indigent criminal defendants are entitled to under a Kentucky statute is altogether different from what they are entitled to as a matter of constitutional due process.

The Court of Appeals correctly recognized that *Hicks* was not a due-process case [Tab 1 at 9], but nevertheless incorporated *Hicks*'s "reasonably necessary" statutory standard into its due-process holding. Relying on *Hicks*, the Court of Appeals held that "upon a finding by the trial court that such expert funding is *reasonably necessary* to establish a defense to a DNA petition,

funding for such expert fees shall be paid pursuant to KRS 311.110(1)(b)."[7] [Tab 1 at 10 (emphasis added)]. In essence, the Court of Appeals held that, as a matter of constitutional law, Kentucky courts must apply the statutory "reasonably necessary" standard from KRS 31.110 to determine whether due process compels a state-funded expert in DNA proceedings. Not only that, but the Court of Appeals directed how the Commonwealth is to pay for expert fees going forward in this new circumstance—*i.e.*, "pursuant to KRS 311.110(1)(b)." [*Id.*] This holding cannot stand. It impermissibly mixes and matches a statutory standard from one context (a criminal prosecution) with a constitutional entitlement in a remarkably different context (a DNA proceeding) and tells the Commonwealth how to fund this new constitutional entitlement. Suffice it to say that the drafters of KRS 31.110 would be surprised that their statutory standard for criminal prosecutions has now been incorporated into constitutional law in an entirely different context.

Importantly, the Court of Appeals did not identify any case law from other jurisdictions that holds, as a matter of constitutional law, that a state must pay for expert-witness fees in DNA proceedings. The Court of Appeals' silence on this issue speaks volumes. At its base, the Court of Appeals' reasoning rests solely on combining *Lassiter*, *Ake*, and *Hicks*—a notion that is

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[7] As discussed above, the Court of Appeals' reference to KRS 311.110(1)(b) presumably was a reference to KRS 31.110(1)(b).

indefensible, for the reasons discussed above. The Court of Appeals offered nothing else to support its far-fetched holding.

Nor did the Court of Appeals grapple with the three-part balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976). This test, which helps a court determine how much process is constitutionally required, requires a court to weigh:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the safeguards used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. In applying the three-part *Mathews* test, the Court must keep in mind that "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (citation omitted).

Starting with the first *Mathews* prong, the private interest at stake is whether or not a parent will be found to have committed dependency, neglect, or abuse of a child. No doubt, such a finding carries repercussions that are meaningful to parents and children. However, such a finding, which is made by a mere preponderance of the evidence, does not result in criminal liability, nor does it result in the termination of parental rights. Instead, it gives a trial court the ability to fashion relief that is tailored to the situation, ranging from a protective order to removal of a child from the parent's home. These are serious consequences for parents and children, to be sure, but they are in no

way comparable to losing one's liberty after a criminal conviction. *See Ake*, 470 U.S. at 76 (discussing the "State bring[ing] its judicial power to bear on an indigent defendant in a criminal proceeding"). Nor are these consequences analogous to having one's parental rights terminated, as the Supreme Court has recognized. *See Santosky*, 455 U.S. at 753 ("If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs."). In other words, the private interests associated with having one's "ongoing family affairs" merely altered in a DNA proceeding is altogether different from having those "ongoing family affairs" forever terminated. Consequently, while the private interests at stake in this matter are far from negligible, these interests pale in comparison to avoiding criminal conviction or losing one's parental rights.

As to the second prong of the *Matthews* test, the risk of an erroneous deprivation in this circumstance is, at best, modest and, at worst, negligible. Keep in mind that, under Kentucky law, an indigent custodial parent in a DNA proceeding already receives an appointed attorney whose job is to protect the parent's interest. KRS 620.100(1)(b). As a general matter, having a court-appointed lawyer in a DNA proceeding is the best possible protection against an erroneous deprivation. It ensures that a parent has someone on his or her side who is familiar with how a DNA proceeding works and who will ensure that the parent's interests are fully represented.

A parent's retention of an expert witness adds little "probable value" beyond what an appointed attorney provides under the second *Mathews* factor. H.C.'s specious rationale for a state-funded expert in this matter demonstrates this point. As discussed above, H.C. requested expert funding to show that even though she was abusing drugs, her drug use was not severe enough to affect her ability to parent. An expert who offered this testimony would add nowhere near the "probable value" added by the psychiatrist in *Ake*. There, an expert was needed to "identify the 'elusive and often deceptive' symptoms of insanity" and "translate a medical diagnosis into language that will assist the trier of fact." *Ake*, 470 U.S. at 80. The symptoms associated with drug abuse and one's ability to parent are not concepts that are "elusive and often deceptive." Nor are these symptoms "complex and foreign," as in *Ake*. *Id.* at 81. Instead, one's ability to parent while abusing drugs is an issue that, generally speaking, can be readily determined by the fact-finder. Thus, the second *Mathews* factor weighs decidedly in favor of the Cabinet.

The third and final *Mathews* factor is the state's interest, which specifically includes the "fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Suffice it to say that the unfunded mandate created by the Court of Appeals' decision, which requires expert funding for an indigent parent whenever it is "reasonably necessary," will significantly strain the state's already limited budget. DNA proceedings happen across the Commonwealth on a daily or near-

daily basis. To give a rough idea of the volume of DNA proceedings, at one point within the past year, approximately 9,654 children were in out-of-home care.[8] To state the obvious, the Commonwealth has a limited budget to spend on child welfare. The Cabinet endeavors daily to spend those dollars in the manner that best protects the Commonwealth's children and their families. To thrust a new unfunded liability onto the Commonwealth will upset what is already a cash-strapped endeavor. In sum, the best use of the Commonwealth's limited child-welfare dollars is *not* paying for an expert witness to testify that H.C.'s drug use is not bad enough to make her child abused or neglected.

Making matters worse, the Court of Appeals' opinion gives no guidance on how much the Commonwealth must pay each expert witness who testifies in a DNA proceeding. As Judge Jones' dissent summarized:

> [T]he majority's holding raises more questions than it answers. Presumably, the majority has determined that expert representation entails expert investigation and testimony. However, the majority has not addressed how the $500 limit set forth in KRS 625.080(3)[9] will apply when an expert is appointed. Does the $500 cap apply to the combined effort of the party's counsel and expert, thereby reducing the amount of the attorney fee? Is there a separate fee for experts? What is the cap on the fee? None of these questions are answered by the majority. Because this is a matter that should be addressed by the General Assembly following debate and consideration of funding issues. It should not be dealt with by judicial fiat.

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[8] Mora, Number of Children in Kentucky Foster Care at Record High (Sept. 13, 2018), *available at* https://www.wlky.com/article/number-of-children-in-kentucky-foster-care-at-record-high/23116048 (last accessed March 10, 2019).

[9] Judge Jones presumably meant to reference KRS 620.100(1)(b), which provides a $500.00 cap on attorneys' fees in DNA proceedings. KRS 625.080(3) similarly provides a $500.00 cap in involuntary termination proceedings.

[Tab 1 at 12]. Thus, not only does the Court of Appeals' opinion require the Commonwealth to stretch limited dollars even further, but the Court of Appeals "raises more questions than it answers" about how much its holding will divert from the amount that the Commonwealth otherwise spends on child welfare.

Considered together, all three *Mathews* factors strongly weigh against extending due process to guarantee expert funding to parents in DNA matters whenever it is "reasonably necessary." Although parents' interests in DNA matters are meaningful, they are significantly less than the private interests at stake in other matters. In addition, because Kentucky law already guarantees indigent parents a court-appointed attorney in DNA cases under the framework established at KRS 620.100(1)(b), the risk of an erroneous deprivation is quite low. Moreover, there is only limited "probable value" in having expert testimony in DNA proceedings. In addition, imposing an unfunded liability on the Commonwealth will cause an already under-funded child-welfare regime to become even more under-funded.

C. The Court of Appeals' decision flouts separation of powers.

It must finally be observed that the Commonwealth's constitutional separation of powers provides further grounds for reversing the Court of Appeals in this matter. As this Court has summarized:

> "It is well settled law in the state of Kentucky that one branch of Kentucky's tripartite government may not encroach upon the inherent powers granted to any other branch." Sections 27

> and 28 are "clear and explicit on this delineation." "[T]he framers of Kentucky's constitution . . . were undoubtedly familiar with the potential damage to the interests of the citizenry if the powers of government were usurped by one or more branches of that government." Thus, "it has been our [predecessor's] view [and our view], in interpreting Sections 27 and 28, that the separation of powers doctrine is fundamental to Kentucky's tripartite system of government and must be 'strictly construed.'" One branch, therefore, is not empowered to exercise power properly belonging to another branch simply because the other branch is "along for the ride." *Because of the judiciary's unique position as the final unchecked arbiter of constitutional disputes, we "should be particularly vigilant to restrain [our] own exercise of power." It is important that the powers of the Legislature should not "stand or fall according as they appealed to the approval of the judiciary; else one branch of government, and that the most representative of the people, would be destroyed, or at least completely subverted to the judges."*

Elk Horn Coal Corp. v. Cheyenne Res., Inc., 163 S.W.3d 408, 422 (Ky. 2005) (emphasis added) (internal citations omitted).

The Court of Appeals' decision violates Kentucky's strict separation of powers. The Court of Appeals simply rewrote and extended KRS 31.110, a statute almost exclusively dealing with criminal cases, to provide for expert funding whenever "reasonably necessary" in DNA cases. The Court of Appeals simply announced that—as a matter of public policy—"funding for such expert fees shall be paid pursuant to KRS [31.110](1)(b)." [Tab 1 at 10]. This pronouncement violates the General Assembly's intent by adding an entirely new category of fees to be paid under KRS 31.110. Furthermore, the Court of Appeals also apparently rewrote KRS 620.100(1)(b), which specifically caps attorneys' fees for indigent parents in DNA proceedings at $500.00 and makes

no allowance for any sort of funding for expert testimony. In these two respects, the Court of Appeals' holding violates the core principle that "the enactment of substantive law is the exclusive prerogative of the Legislature under our Constitution." *Elk Horn* at 163 S.W.3d at 423. Judge Jones got it exactly right by writing that "this is a matter that should be addressed by the General Assembly following debate and consideration of funding issues. It should not be dealt with by judicial fiat." [Tab 1 at 12].

CONCLUSION

There is no need for this Court to perform an exhaustive analysis of constitutional due-process requirements in order to resolve this appeal. The simple truth is that the Court of Appeals completely disregarded the black letter case law of the Commonwealth by failing to dismiss this appeal for an untimely notice of appeal. Because the extension of time granted by the Harrison Family Court was clearly in violation of the civil rules, H.C.'s notice of appeal was not timely filed.

If this Court nevertheless reaches the merits of this appeal, it is clear that the Court of Appeals unjustifiably expanded existing case law by dramatically extending the scope of inapplicable federal constitutional jurisprudence. Furthermore, this unprincipled action on the part of the Court of Appeals was in direct violation of Kentucky's strict separation of powers. For these reasons, the Cabinet respectfully requests that the Court of Appeals' decision be reversed.

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